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In The
SUPREME COURT OF THE UNITED STATES
October Term, 1996

ARKANSAS EDUCATIONAL TELEVISION COMMISSION,
Petitioner,
v.
RALPH P. FORBES,
Respondent.

On Writ of Certiorari to the
United States Court of Appeals
for the Eighth Circuit

BRIEF OF AMICUS CURIAE NATURAL LAW PARTY OF THE UNITED STATES IN SUPPORT OF RESPONDENT

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TABLE OF CONTENTS

STATEMENT OF INTEREST OF AMICUS CURIAE..... 1

SUMMARY OF ARGUMENT..... 2

ARGUMENT..... 2

I. Governmental Debate Sponsors May Not Select Candidates for a Debate Based on a Subjective Evaluation of Whether they are "Newsworthy" or Have Public Support..... 3

A. As a matter of law, newsworthiness is an impermissible content-based standard..... 3

B. Newsworthiness is also an impermissible viewpoint-based criterion..... 7

C. The newsworthiness standard will systematically exclude all but those who are already popular, thereby preventing challenges to the parties in power 10

D. Important Goals of the First Amendment will be Undermined by a Policy that Excludes Unpopular Candidates from Debates..... 15

E. The newsworthiness standard is impermissibly subjective..... 21

II. There is no compelling state interest which permits AETN to select candidates for debates based on editorial discretion and a subjective determination of who is "newsworthy.' 23

III. Any compelling interest, even if one existed, must be unrelated to the suppression of speech 27

IV. The means adopted by AETN to achieve its alleged compelling state interests are inappropriate and not narrowly tailored 28

V. The Government Employees at AETN are not Independent Journalists but State Actors, and Their Exclusionary Decisions need to be scrutinized by the judiciary 28

CONCLUSION 30

APPENDIX A-1

TABLE OF AUTHORITIES

CASES

Buckley v. Valeo, 424 U.S. 1, 14, 96 S.Ct. 612, 632 (1976) ..... *passim*

Carey v. Brown, 447 U.S. 455, 467, 100 S.Ct. 2286, 2293, 65 L.Ed.2d 263(1980) 16

Chandler v. Georgia Public Television Communications Commission, 917 F.2d 486 (11th Cir. 1990) ..... *passim*

City Council of City of Los Angeles v. Taxpayers for Vincent, 466 U.S. 789, 804, 104 S.Ct. 2118, 2128, 80 L.Ed. 2d 772, 786 (1994) ..... *passim*

Cornelius v. NAACP Legal Defense & Education Fund, 473 U.S. 788, 105 S.Ct. 3439, 87 L.Ed. 2d 567 (1985) 7

Columbia Broadcasting System v. Democratic National Comm., 412 U.S. 94 (1973) 27

Cosmopolitan Broadcasting Corp. v. FCC, 581 F.2d 917, 921 (D.C. Cir. 1978) 25

Fulani v. League of Women Voters Educ. Fund, 882 F.2d 621, 627 (2d Cir. 1989) 5

Forbes v. Arkansas Educational Television Commission, 93 F.3d 497, 503 (8th Cir., 1996)..... 9, 20, 21, 29

Greenberg v. Bolger, 497 F.Supp. 756 (E.D.N.Y. 1980)..... *passim*

Lamb's Chapel v. Center Moriches Union Free School District, 508 U.S. 384, 113 S.Ct. 2141, 124 L.Ed.2d 352 (1993)..... 7, 10

Lovell v. Griffin, 303 U.S. 444, 58 S. Ct. 666 (1938)..... 4, 27

Marcus v. Iowa Public Television, 93 F3d 1137, 1142 (8th Cir. 1996)..... *passim*

Mills v. Alabama, 384 U.S. 214, 218, 86 S.Ct. 1434, 1437, 16 L.Ed. 2d 484 (1966)..... 16

Monitor Patriot Co. v. Roy, 401 U.S. 265, 272, 91 S.Ct. 621, 625, 28 L.Ed. 2d 35 (1971)..... 16

New York Times Co. v. Sullivan, 376 U.S. 254, 270, 84 S.Ct. 710, 720, 11 L.Ed. 2d 686, 701 (1964)..... 16

Powell v. McCormack, 395 U.S. 486, 547, 89 S.Ct. 1944, 1977, 23 L.Ed. 2d. 491 (1969)..... 21

Procunier v. Martinez, 416 U.S. 396, 414 94 S.Ct. 1800, 1811, 40 L.Ed. 2d 224 (1974)..... 27

Red Lion Broadcasting Co v. FCC, 395 U.S. 367, 396, 89 S.Ct. 1794, 1810 (1969)..... 25

Regan v. Time, Inc., 468 U.S. 641, 648, 104 S.Ct. 3262, 3267, 82 L.Ed. 2d 487 (1984)..... 2, 5, 6

Rosenberger v. Rector & Visitors of the University of Virginia, 115 S.Ct. 2510, 2516, 132 L.Ed.2d 700 (1995)..... 4, 7, 10

Schneider v. State, 308 U.S. 147, 60 S.Ct. 146, 84 L.Ed. 2d 772 (1984)..... 27

Southeastern Promotions, Ltd. v. Conrad, 420 U.S. 546, 553, 95, S. Ct. 1239, 1244, 43 L. Ed.2d 448, 456 (1974)..... 23, 26

Sweezy v. N. Hampshire, 354 U.S. 234, 1957..... 13

Stromberg v. California, 283 U.S. 359, 51 S. Ct. 532 (1931)..... 4, 16

United States V. O'Brien, 391 U.S. 367, 377, 88 S.Ct. 1673, 1679, 20 L.Ed. 2d 672 (1968)..... 27

U.S. Term Limits, Inc,. 514 U.S. 779, 115 S.Ct. 1842 1845, 131 L.Ed. 2d 881 (1995), *citing Powell v. McCormack*, 395 U.S. 486, 547, 89 S.Ct. 1944, 1977, 23 L.Ed. 2d. 491 (1969)..... 20, 21

Williams v. Rhodes, 393 U.S. 23, 39 (1968) (Douglas, J., concurring) *quoting Sweezy v. New Hampshire*, 354 U.S. 234, 250-251 (1957) (opinion of Warren, C.J.)..... 13

Writer's Guild of America v. American Broadcasting, 609 F.2d 355, 362 (9th Cir. 1979)..... 25

STATUTES AND REGULATIONS

18 U.S.C. § 504(1)..... 5
26 U.S.C. §§ 9001-9013..... 6
11 CFR § 110.13(c)..... 24

SECONDARY AUTHORITIES

Jack Anderson and Jan Muller column, *Hardly a Choice Debate Setup*, The Washington Post, September 26, 1996..... 12

Appellant's Reply Brief on Appeal to the 8th Circuit Court of Appeals in *Marcus v. Iowa Public Television*, February 27, 1997 at http: //www.lisco. com/~crimevaccine/appelbrief.htm 22

Coleman McCarthy column, *A 'Minor' Problem with the Debates*, The Washington Post, October 1, 1996..... 13

Committee for the Study of the American Electorate statistics on voter turnout in U.S. elections..... 18, A-1

Downing, *Candidates For Sale*, NEWSWEEK, October 28, 1996..... 12

Duffy and Gibbs, *The Money Mess*, TIME,

November 11, 1996..... 12

60 Fed. Reg. 64,261 (1995).....24

International Foundation for Election Systems statistics on voter turnout in foreign countries..... A-2

J.D. Gillespie, Politics at the Periphery: Third Parties in Two-Party America, 24..... 2, 11

Non Partisan Center for Responsive Politics Home Page, http://www.crp.org/spend.htm..... 12

* Supreme Court Rule 37.6 Statement: No counsel for a party authored this brief in whole or in part, and no person or entity, other than the *amicus curiae* or its counsel, made a monetary contribution to the preparation or submission of this brief.

STATEMENT OF INTEREST OF AMICUS CURIAE

Amicus the Natural Law Party of the United States ("NLP") is a political party formed in 1992 to bring a scientific perspective into government. The party's philosophy is that where possible, government programs should be based on what has been proven effective. The party believes that science can be a harmonizing influence in a society torn by conservatives warring with liberals. The common ground for agreement ought to be that proven programs should be adopted by government and unproven ones abandoned. The name "Natural Law Party" is itself a reference to the laws of nature — that is, the laws of science.

In the 1996 general election the party's candidate for President of the United States, Dr. John Hagelin, a physicist and university professor, was on the ballot in 47 states and the District of Columbia; in 1996 the party had approximately 400 candidates on the ballot for state and federal office in 49 states plus the District of Columbia.

As a new political party, the NLP has experienced firsthand the obstacles faced by its candidates in attempting to participate in political debates.[1] By virtue of the NLP experience with numerous candidates being denied participation in debates, Amicus believes it may be able to provide the Court with relevant matter not brought to its

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[1] Mr. Marcus, the NLP's counsel of record in this case, was himself an NLP candidate for attorney general of Iowa in 1994 and for U.S. Congress in 1996. He and six other candidates and several political committees are plaintiff/appellants in a case presently on appeal to the 8th Circuit Court of Appeals, *Marcus v. Iowa Public , 93 F.3d 1137 (8th Cir. 1996)*, challenging, on First Amendment grounds, the right of Iowa Public Television ("IPTV") to exclude all but the Republicans and Democrats from debates IPTV sponsored preceding the 1996 general election.

attention by the parties.

The parties have consented to the filing of this brief. Copies of the letters of consent have been filed with the Clerk.

SUMMARY OF THE ARGUMENT

Petitioner Arkansas Educational Television Network ("Petitioner" or "AETN") argues that it should be able to make "editorial" judgments about whom to invite to debates based on its assessment of the "newsworthiness" of the candidates. But newsworthiness is a content-based and a viewpoint-based standard, which "cannot be tolerated under the First Amendment." *Regan v. Time, Inc.*, 468 U.S. 641, 648, 104 S. Ct. 3262, 3267, 82 L.Ed. 2d 487 (1984).

Moreover, the selection of candidates for a debate based on newsworthiness would systematically exclude candidates expressing unpopular viewpoints, thereby preventing challenges to the parties in power and retarding progress in society. It is self-evident that fundamental reform often comes from outside what is already popular or mainstream. As the author of one important treatise on third parties states, "Many of America's noblest and far-reaching advances in freedom were third-party proposals years before the major parties touched them with even the longest pole." J. D. GILLESPIE, POLITICS AT THE PERIPHERY: THIRD PARTIES IN TWO-PARTY AMERICA, 24, University of South Carolina Press (1993).

Moreover, a policy of limiting debates to candidates who are sufficiently popular in the opinion of government employees flies in the face of the overall goal of the First Amendment of fostering "uninhibited, robust and wide-open" debates, and contradicts a long line of cases stating that placing broad discretion in the hands of government

employees to regulate who gets to speak is impermissible because of the potential for arbitrary action and censorship.

The government has no compelling state interest that would permit it to select candidates for debates based on editorial discretion and subjective criteria. The compelling state interest argument of AETN also fails because, even if such an interest existed, it must be unrelated to the suppression of speech. The state interest that AETN points to is a purported interest in permitting its journalists to make editorial decisions to deny persons deemed unworthy of being in a debate the right to speak.

Finally, AETN is a state actor. While the private press may *sometimes* be in an adversarial role with respect to government, in weighing First Amendment issues it can *never* be assumed that government journalists are in an adversarial relationship with their employers.

ARGUMENT

I. Governmental Debate Sponsors May Not Select Candidates for a Debate Based on a Subjective Evaluation of Whether they are "Newsworthy" or Have Public Support.

Petitioner AETN states, as its basic position, that "AETN's Executive Director Susan Howarth concluded that petitioner [sic] Ralph P. Forbes was not newsworthy enough to be invited to the debate" (Petitioner's Brief, p. 3).

A. As a matter of law, newsworthiness is an impermissible content-based standard.

"Newsworthiness" is a content-based standard which

violates the principle that "government may not regulate speech based on its substantive content or the message it conveys." *Rosenberger v. Rector & Visitors of the University of Virginia*, 115 S.Ct. 2510, 2516, 132 L.Ed.2d 700 (1995). The government (including the public broadcasting stations it owns and controls) may not systematically exclude the politically unpopular because such an exclusion is content-based (as well as viewpoint-based, as discussed below). In *City Council of the City of Los Angeles v. Taxpayers for Vincent*, 466 U.S. 789, 804,104 S.Ct. 2118, 2128, 80 L.Ed.2d 772, 786 (1984), this Court stated that speech may sometimes be curtailed when necessary to advance a significant and legitimate state interest, but held:

> [T]here are some purported interests — *such as a desire to suppress support for a minority party or an* ***unpopular cause****, or to exclude the expression of certain points of view from the marketplace of ideas—that are so plainly illegitimate they would immediately violate the rule* [that would permit the exclusion of a speaker based on a compelling state interest] [*citing Stromberg v. California*, 283 U.S. 359, 51 S. Ct. 532 (1931) and *Lovell v. Griffin*, 303 U.S. 444, 58 S. Ct. 666 (1938)]. (emphasis added.)

Here, the *expressly stated desire* of AETN is to exclude unpopular candidates and their causes (that is, those without "public support and interest") from the debates, which is directly at odds with this Court's stated view that a *desire* "to suppress support for a minority party or an unpopular cause" is "plainly illegitimate." *Vincent*, 466 U.S. at 804.[2]

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[2] AETN's reliance on the jury's findings (Petitioner's Brief, p. 33) is misplaced; while AETN may not have excluded Mr. Forbes due to its "objections or opposition to his views," AETN makes no effort to conceal the fact that it excluded Mr. Forbes because it deemed him to be without popular support. (*See e.g.*, Petitioner's Brief, pp. 15-16, 25, 34.)

Importantly, in the case of third party candidates, the concepts of "cause" and "candidacy" are intertwined. Such candidacies are often used to "educate the public, to advance unpopular ideas, and to protest the political order, even if the particular candidate has little hope of election. The First Amendment most certainly protects advocacy of this type." *Fulani v. League of Women Voters Educ. Fund*, 882 F.2d 621, 627 (2d Cir. 1989).

In *Regan v. Time, Inc.*, 468 U.S. 641, 648, 104 S. Ct. 3262, 3267, 82 L.Ed. 2d 487 (1984), the Court determined that "newsworthiness" is an unconstitutional content-based criterion which "cannot be tolerated under the First Amendment." In *Regan*, which involved the publication of photographs of money, the Court stated:

> [U]nder the statute (18 U.S.C. § 504(1), one photographic reproduction will be allowed and another disallowed solely because the Government determines that the message being conveyed in the one is newsworthy or educational while the message imparted by the other is not. The permissibility of the photograph is therefore often 'dependent solely on the nature of the message being conveyed.' *Regulations which permit the government to discriminate on the basis of the message cannot be tolerated under the First Amendment.*

Id. (citations omitted.) (emphasis added.)

Any determination by AETN of the "newsworthiness" of

Mr. Forbes is similarly a determination that the content of the AETN debates will be more or less "newsworthy" without him than with him. The court in *Marcus v. Iowa Public Television*, 93 F3d 1137, 1142 (8th Cir. 1996), on facts similar to those of this case, purported to distinguish *Regan* on the grounds that *Regan* was a criminal case. There is no reason to believe that *Regan*'s condemnation of the suppression of speech based on "newsworthiness" applies only in criminal matters, however. This Court in *Regan* held that the regulations at issue were impermissible due to the First Amendment, *not* because the defendant was accused of a crime. A qualified candidate for Congress, seeking to engage in political speech, an activity which is "afforded the broadest protection . . . to assure [the] unfettered interchange of ideas for the bringing about of political and societal changes," *Buckley v. Valeo*, 424 U.S. 1, 14, 96 S.Ct. 612, 632 (1976), is entitled to as much protection under the Constitution as a criminal defendant accused of using a photograph of currency, as in *Regan*.

The connection between the popularity of candidates and their causes and content-based exclusions was analyzed by the court in *Greenberg v. Bolger*, 497 F.Supp. 756 (E.D.N.Y. 1980). *Greenberg* dealt with the 1980 Postal Service Appropriation Act, which granted preferential postal rates to "major" and "minor" parties, but not to "new" parties, as those terms are defined in the Campaign Fund Act, 26 U.S.C. §§ 9001-9013. A party's status as major, minor, or new is determined by the percentage of the popular vote received by the party's candidate for president in the last presidential election (all parties but the Republican and Democratic were "new"). The *Greenberg* court said it was arguable that nationwide popularity did not reflect a judgment based on the content of the mail sent by new parties, but held that:

> To suggest that a regulation that confers benefits on the basis of popularity is not content-based would require the court to draw an artificial distinction between the popularity and the substance of an idea. The political positions of the plaintiffs, in their view, are substantially different from those of the major parties . . . [T]he government has chosen to benefit those with popular views and burden those with unpopular views.

Greenberg, 497 F.Supp. at 775-76. (citations omitted.)

B. Newsworthiness is also an impermissible viewpoint-based criterion.

In *Rosenberger*, the Court distinguished between content discrimination, which the Court said "may be permissible *if* it preserves the purposes of the limited forum," and viewpoint discrimination, which "is presumed impermissible," even in a non-public forum, when directed against speech otherwise within the forum's limitations. *Rosenberger* at 115 S.Ct. at 2517. In *Rosenberger* the Court explained that viewpoint discrimination is "an egregious form of content discrimination." *Id.* at 2516.

In *Lamb's Chapel v. Center Moriches Union Free School District*, 508 U.S. 384, 113 S.Ct. 2141, 124 L.Ed.2d 352 (1993), the Court analyzed its holding in *Cornelius v. NAACP Legal Defense & Education Fund*, 473 U.S. 788, 105 S.Ct. 3439, 87 L.Ed. 2d 567 (1985). A church was denied access by a school board to the after hours use of school property, based on a regulation that allowed social, civic, and recreational uses of its schools, but prohibited use by any group for religious purposes. The Court determined that even in the context of a non-public forum, this *viewpoint*

discrimination could not be tolerated; the film the religious group wanted to show covered a topic that was encompassed within the purpose of the forum. The Court stated:

> The principle that has emerged from our cases "is that the First Amendment forbids the Government to regulate speech in ways that favor some viewpoints or ideas at the expense of others."

Id. 508 U.S. at 394, quoting *Vincent*, 466 U.S. at 804.

In his dissent in *Chandler v. Georgia Public Television Communications Commission*, 917 F.2d 486 (11th Cir. 1990), Judge Clark, analyzing a public television station's determination to exclude a Libertarian candidate from a debate based on his lack of newsworthiness, pointed out that it was not the broadcaster's content-based decision to air a debate in the first place that was challenged, but rather the station's decision to exclude the Libertarian viewpoints from the debate. Judge Clark stated:

> [N]omination by a major party bestows a greater likelihood of election than nomination by a less-known party. And the Libertarian candidates might very well be quite far behind in the polls. *But a judgment that their views are not newsworthy is in reality a facade for viewpoint-based discrimination.*
>
> * * *
>
> [A] decision that excludes the Libertarians based on the fact that their views are less newsworthy than those of the major party candidates is necessarily based on an estimation of the value and substance of their views. Because viewpoint discrimination is unconstitutional in any forum, public or otherwise, the district court should have been affirmed [and the Libertarian included in the debate].

Chandler at 493-94. (emphasis added.)

Here the topic Mr. Forbes wanted to cover as a candidate was well within the purpose of the forum, and the only definition of newsworthiness cited by Petitioner (Petitioner's Brief, p. 27, n.5) shows that the exclusion of candidates based on newsworthiness is based on the nature of the ideas expressed. In the absence of any testimony by the witnesses in the *Forbes* case regarding the meaning of the term "newsworthiness," AETN's brief (Petitioner's Brief, p. 27, note 5) resorts to *Marcus v. Iowa Public Television*, 93 F.3d 1137 (8th Cir. 1996) for a definition of that term by Iowa Public Television's expert witness, Professor Barbara Mack of Iowa State University.[3]

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[3] As reported in *Marcus* at 1143-1144, Professor Mack testified:

> When I teach freshmen journalists about what is meant by newsworthiness, what makes someone newsworthy, you talk about the—the quality that that person or that news event has.
>
> Is that news event going to have an impact on the people who read your newspaper or who watch your television station? Is it going to change their lives? Does it have the potential to change their lives? Is it something which is a public conflict? Conflict is one of our classic news values. Impact is a classic news value.
>
> We talk about the news—the news value of locality. As strange as it may seem, a bus accident that occurs in India will get very little coverage in the *Des Moines Register*, but a bus accident that occurs in downtime Des Moines at rush hour, even though it may injure fewer people will get more news coverage. Why? Because its local, and local news has importance.
>
> We talk about the value of human interest, and many of the stories that

Id. at 1143-1144.

Professor Mack's testimony evaluates the "quality" of a political candidate which must necessarily be based on the quality of that person's ideas. In addition, whether the news event [debate] is "going to have an impact on the people," or "change their lives" depends on what is expressed. In addition, Professor Mack states that news feature stories are those that appeal to the characteristics of the human spirit.This too involves an analysis of the viewpoints the journalist expects to be expressed by the candidate. These are precisely the kinds of evaluations condemned in *Vincent*, *Lamb's Chapel*, and *Rosenberger*.

C. The "newsworthiness" standard will systematically exclude all but those who are already popular, thereby preventing challenges to the parties in power.

AETN's decision that Mr. Forbes was not newsworthy was based largely on its determination that he lacked popularity or was not a candidate who had a realistic chance of winning the election in AETN's opinion. (Petitioner's Brief, pp. 10-14). But basing candidate selection for a debate on the existing public support for the particular candidate will systematically exclude minority voices, new and therefore unknown voices, and candidates expressing unpopular viewpoints. A standard of popularity or "newsworthiness" will deny such candidates the opportunity to challenge the major parties, deny the public the opportunity to hear from

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most people think of as feature stories are human interest stories. They appeal to the characteristics of the human spirit.

So when a journalist is making a decision about what is or is not news, there is always a very careful evaluation of each of those factors.

those challenging the *status quo*, and the effect will be to retard progress by preventing fundamental reform in society.

It is self-evident that fundamental reform typically comes from outside what is already popular or mainstream. The very nature of reform is that it is something other than what is currently accepted or popular. It is also evident that third parties have been responsible for many of society's most far-reaching reforms. As stated in *Greenberg v. Bolger, 497 F.Supp. 756, 771 (E.D.N.Y. 1980)*, third parties have been responsible for "the development of policies in advance of the time the established parties are ready to act" and they are responsible for the "testing of new programs." The writer of an important treatise on third party activities states: "Many of America's noblest and far-reaching advances in freedom were third party proposals years before major parties touched them with even the longest pole." J. D. Gillespie, Politics at the Periphery: Third Parties in Two-Party America, University of South Carolina Press, 24 (1993). As indicated in Professor Gillespie's book, the Liberty Party struggled against slavery 20 years before the Civil War; the Prohibition Party and the Socialist Party first demanded woman suffrage; the Populist Party first campaigned for equal rights for men and women; the Socialist Party, the Populist Party, and the Prohibition Party first sought to bring initiatives and referendums into the law; the Socialist Party first advocated the graduated income tax, shorter working hours, the abolition of child labor, public works for the unemployed and unemployment insurance; and decades before the Montgomery bus boycott, Communists and other Americans viewed as "radicals" were speaking out strongly on behalf of the rights of African-Americans. *Id.* at 24-27 (1993).

Importantly, the reason such significant reforms originate with the minor parties is *not* coincidence. Underlying the

phenomenon of third party innovations is the recognition that the major parties are driven more by the desire to win elections than by ideology. As Professor Gillespie says:

> The Democrats and Republicans do attract some people for reasons of principle, even ideology; but these major parties mainly seek to win elections and, through winning, to control the political system and its policy processes.

Id. at 12.

Money provided by lobbyists, corporations and wealthy individuals tends to destroy objectivity in political decisionmaking, but money dominates major party politics today, because the money is considered necessary to win elections. *See* Downing, *Candidates For Sale*, *NEWSWEEK*, October 28, 1996, at 24-32, *and* Duffy and Gibbs, *The Money Mess*, *TIME*, November 11, 1996, at 32-41. In 1994, for example, approximately 90% of Congressional races were won by the candidate who spent the most money.[4] The major parties' devotion to "polling" and focus groups, also makes it apparent that the major parties seek to find out what the public wants to hear, and then cater to what is already popular. When the major parties, therefore, base campaigns on what will play well to the voters, and especially to special interest groups seeking to preserve their positions in society, it retards progress in society and causes political campaigns to be devoid of fresh ideas. *See* Jack Anderson and Jan Muller column, *Hardly a Choice Debate Setup*, The Washington

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[4] Statistics compiled by the Center for Responsive Politics ("CRP"), Washington, D.C., a non-profit educational organization. Other statistics of CRP on the importance of money in winning elections is at http://www.crp.org/spend.htm.

Post, September 26, 1996 ("[I]n an election year that's generally devoid of new ideas, the voters of America deserve to see what choices are available outside the two major parties"); *and see* Coleman McCarthy column, *A 'Minor' Problem with the Debates*, The Washington Post, October 1, 1996 ("Presidential debates ought to be about the choices of ideas in the marketplace of politics, with the aisles as wide as possible"). As a result of these factors, third party and independent voices are, and long have been, necessary to inject new theories and bring new ideas to the public. And the value of having these diverse perspectives lively in the political dialogue has long been recognized by this Court. As former Chief Justice Earl Warren said:

> All political ideas cannot and should not be channeled into the programs of our two major parties. History has amply proved the virtue of political activity by minority, dissident groups, which innumerable times have been in the vanguard of democratic thought and whose programs were ultimately accepted. . . .The absence of such voices would be a symptom of grave illness in our society.

Williams v. Rhodes, 393 U.S. 23, 39 (1968) (Douglas, J., concurring) *quoting Sweezy v. New Hampshire*, 354 U.S. 234, 250-251 (1957) (opinion of Warren, C.J.).

Unfortunately, the testimony in this case reveals that the major parties are not alone in catering to what is popular. When broadcasters require that candidates have popular support *before* they can gain access to the media, it poses a formidable catch-22 for third party candidates and for the introduction of new ideas in society since, in an electronic age, new ideas and new candidates need broadcast exposure in order to gain popular support for these ideas. *See Greenberg v. Bolger*, 496 F.Supp. 756, 776-776 (E.D.N.Y. 1980).

AETN seeks, in part, to justify its decision to allow only candidates with popular support to participate in debates based on the fact that the Associated Press or other private broadcasters weren't giving Mr. Forbes coverage. But the *private* broadcasting industry requires public support because commercial considerations, such as the need to have high ratings or to attract advertising revenues, dictate that candidates already in the public eye be featured in the media and media-sponsored debates. *See, Chandler v. Georgia Public Telecommunications Commission*, 917 F.2d 486, 492 (11th Cir. 1990) (Clark, J. dissenting). Public television, however, is different. Public television *is* the government. It uses the people's tax money and has government resources that should not be used to favor or endorse particular candidates. Moreover, public television was not created with the same considerations as privately owned commercial broadcasting, and many of the arguments of Petitioner, and the government agencies that support Petitioner, are simply at odds with public television's laudable original goals and purpose.[5]

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[5] The *Statement of Principles of Editorial Integrity in Public Broadcasting* provides a brief history of public television. It relates that the Carnegie Commission on Educational Television

> "proposed a new kind of television — public television which was to include all that is of human interest and importance which is not at the moment appropriate or available for support by advertising . . . a new system not patterned after the commercial system . . . or any other existing system." (App. 91a).

The *Statement of Principles* also states that "[p]ublic broadcasting was created to provide a "wide range of programming" and one "which provides alternatives in quality, type and scheduling [to commercial broadcasting]." (App. 70a).

As stated by Judge Clark in his dissent in *Chandler* (a case where a public broadcasting station hosted a debate between a Republican and a Democrat, but excluded the Libertarian, the only other candidate on the ballot):

> The purposes behind public broadcasting are significantly different from those behind commercial, competitive television. Public broadcasting is premised on the belief that the free market will not provide all of the programming and information necessary for an educated public. Thus, many programs that would fail miserably to pay their own way on the private networks appear on public television. The political debates at issue appear to be a case in point. *In the context of noncompetitive programming, the government's stated rationale for excluding [candidates] — that their views are less newsworthy than those of other candidates — seems especially weak and not a little ironic.*

Chandler, 917 F.2d at 492 (emphasis added).

As Judge Clark observes, such selective exclusion results in an agency of the state effectively *endorsing* the major party candidates. *Id.* at 494. Accordingly, when AETN bases decisions on whom to include in a debate based on a purported analysis of the pre-existing public support of the candidates, it is not in keeping with the noble purpose underlying public broadcasting, and it retards progress in society.

D. Important Goals of the First Amendment will be Undermined by a Policy that Excludes Unpopular Candidates from Debates.

"Newsworthiness," as a government broadcast standard, flies in the face of the overall goal of the First Amendment of fostering "uninhibited, robust, and wide-open" debates, *New York Times Co. v. Sullivan*, 376, U.S. 254, 270, 84 S.Ct. 710, 720, 11 L.Ed.2d 686, 701 (1964), so that political and societal changes "may be obtained through lawful means." *Carey v. Brown*, 447 U.S. 455, 467, 100 S.Ct. 2286, 2293, 65 L.Ed.2d 263 (1980); *see also Stromberg v. California*, 283 U.S. 359, 369, 51 S.Ct. 532, 536, 75 L.Ed.1117 (1931). As this Court stated in *Buckley v. Valeo*, 424 U.S.1, 13, 96 S.Ct. 632 (1976) *citing Mills v. Alabama*, 384 U.S. 214, 218, 86 S.Ct. 1434, 1437, 16 L.Ed. 2d 484 (1966) and *Monitor Patriot Co. v. Roy*, 401 U.S. 265, 272, 91 S.Ct. 621, 625, 28 L.Ed. 2d 35 (1971):

> [T]here is practically universal agreement that a major purpose of that [First] Amendment was to protect the free discussion of governmental affairs . . . of course includ[ing] discussions of candidates. . . . [I]t can hardly be doubted that the constitutional guarantee has its fullest and most urgent application precisely to the conduct of campaigns for political office.

Against this background, AETN and Amici the Association of America's Public Television Stations, the Corporation for Public Broadcasting, *et al.* (hereinafter, "Amicus PBS") have argued that voter education would be lessened if unpopular candidates were allowed to appear in these debates, and that the viewers are best served by having the issues be discussed in depth by those candidates who are receiving "serious support from the public." (Petitioner's Brief, p. 14). Amicus PBS argues that some races had 11, 9 or 7 candidates on the ballot, and opening the door to the third party candidates will result in debates including people like Lar Daly "campaigning in an Uncle Sam costume" and an unhealthy

"cacophony" of voices (Amicus PBS Brief, pp. 14-18).

First, in 1996, there were 487 third party or independent candidates[6] in the 435 Congressional races, which on average, when added to the Republican and Democratic Party candidates, would result in 3.12 candidates in a Congressional debate, *if* all the candidates requested the opportunity to debate. Moreover, while PBS is apparently offended by a candidate donning a costume as part of his challenge to the political *status quo*, many people are equally offended by what one writer called the "Punch and Judy" politicking that passes for political discourse between the major party candidates. Most importantly, the argument that the major party candidates need all the available time in a debate is little more than the kind of argument that prompted this Court to state:

> [T]he concept that government may restrict the speech of some elements of our society in order to enhance the relative voice of others is wholly foreign to the First Amendment, which was designed to secure the widest possible dissemination of information from diverse and antagonistic sources and to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people.

Buckley v. Valeo, 424 U.S. 1, 48-49, 96 S. Ct. 612, 649 (1976).

If there are too many qualified candidates for a debate, the way to address that issue is to hold two debates or for the states to change their ballot access requirements, not for the government to be given the discretion to censor some of those

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[6] Compilation of Amicus Perot '96.

who have qualified. These arguments by Petitioner and Amicus PBS hinge on the idea that a candidate who does not yet have popular support does not have valuable ideas, which is contrary to this country's political history. It also ignores the fact that the "serious support from the public" enjoyed by the Republicans and Democrats is apparently at an all-time low. Americans are increasingly dissatisfied with political debate and "politics as usual," as reflected in low voter turnout,[7] and surveys showing voter discontent.

Amicus the Commission on Presidential Debates ("CPD") argues in its brief that many "legally qualified" candidates whose names may appear on the election ballot have "extremely modest public support" (CPD Brief, p. 5, n. 3), suggesting they do not deserve to be in the debates. But the relative lack of support is in large measure because of the catch-22 faced by such candidates. Unless they have independent wealth and can purchase media coverage, they need media coverage in order to gain popular support. Moreover, while individual candidates, especially at the Congressional level, are not well known enough for the public to indicate in polls that they would vote for a particular

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[7] A November 7, 1996 release of the Committee for the Study of the American Electorate (the"CSAE") shows that despite an estimated 5 million person increase in voter registration, and record amounts of money spent in the 1996 election, voter turnout in 1996 was only an estimated 48.8% of eligible voters, the lowest turnout since 1924 and the second lowest since 1824 (See Appendix). Voter turnout as a percentage of eligible Americans who voted in each year since 1960 (when the modern the presidential debates began) show a declining trend in virtually all years except in 1992 (when voter turnout increased sharply), a year when Ross Perot challenged the major parties and was included in the presidential debates (the only time three candidates appeared in the presidential debates). CSAE statistics of voter turnout from 1924 to 1996, and statistics on the voter turnout in certain foreign democracies, are set forth in the Appendix to this brief.

candidate, in a democracy that abhors censorship, polls of the Gallup Organization and the Pew Research Center for the People and the Press indicate that approximately 60% of the public desires to hear from these candidates.[8]

In arguing that the goal of voter education is best served by hearing in depth at debates from those with popular support (Petitioner's Brief, pp. 9-10), AETN also ignores the fact that in most debates, the time to answer a given question is limited to a minute or two. As a result, an in-depth discussion would more likely occur with three, four or even more candidates supplying a diversity of viewpoints that helps to educate the voter. This is the "widest possible dissemination of information from diverse and antagonistic sources" that this Court has said is necessary for the "bringing about of political and social changes." *Buckley v. Valeo*, 424 U.S. 1, 49, 96 S.Ct. 612, 649 (1976). The argument of Amicus PBS that "a multicandidate debate may well be useful, for example, during primary season" when the candidates may be unknown or the issues "are only beginning to develop" (Amicus PBS Brief, p. 17), reflects a double standard that values the ideas of major party primary candidates, but not third party candidates, ignoring the historical contributions of candidates who are often derogatorily referred to as "fringe candidates." *See* opposition of Petitioner to motion for divided argument by the Federal Communications

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[8] A Gallup poll released July 7, 1995, found that 60% of Americans favor the formation of a third party to run candidates for President, Congress and state office, while 34% were opposed; even 58% of Democrats and 52% of Republicans favored the formation of a third party. *Gallup Newsletter Archives*, Vol. 60, No. 9, July 7, 1995. Another survey of the Pew Research Center for the People and the Press in 1996 found 58% of Americans saying the country should have a third party. *USA Today*, Election '96 Internet report, August 23, 1996.

Commission. Certainly, in the major party presidential primary debates, we have often seen eight or nine candidates participating in debates, including, in the 1996 elections, Republican primary debates that included Alan Keyes, Richard Luger, Robert Dole, Steve Forbes, Pat Buchanan, Phil Gramm, and Lamar Alexander, even though some lacked popular support.[9]

Amicus PBS also suggests that the 8th Circuit decision in *Forbes* will severely limit broadcasters' *coverage* of debates in an effort to persuade the Court that hundreds of political debates sponsored by the public broadcasters will be canceled. But, the 8th Circuit made it clear that its decision in *Forbes*, under the court's public forum analysis, did not grant the candidate unlimited access to public television. The forum in question was simply the particular debate that was sponsored, not any general right to appear on the station, or to be in debates sponsored by private parties and *covered* by AETN. *Forbes v. Arkansas Education Television Commission*, 93 F.3d 497, 503 (8th Cir., 1996).

In *U.S. Term Limits, Inc. v. Thornton, et al.*, 514 U.S. 779, 115 S.Ct. 1842, 131 L.ed. 2d 881 (1995), the Court expressed its concern that government-imposed standards would lead Congress to become a self-perpetuating body. In

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[9] In 1996, among other reforms, the NLP, Reform and Green parties strongly advocated public financing of political campaigns; the NLP urged that proven preventive health measures be permitted to be paid by Medicare and Medicaid, a low flat tax, a moratorium on the commercialization of genetically engineered foods, or at least labeling such foods (as is now being mandated by the European Union) to give consumers a choice; and the use of proven stress reduction strategies for rehabilitating inmates as an antidote to their chronic anger and violence; and the NLP and Green Party candidates advocated taxing polluting industries to reflect their real cost to society, and "green" payments to promote sustainable agriculture.

the same way, allowing the government to decide who may debate leads to self-perpetuation of government and the erosion of the "fundamental principle of our representative democracy" that "the people should choose whom they please to govern them." *U.S. Term Limits, Inc,*. 514 U.S. 779, 115 S.Ct. 1842, 1845, 131 L.Ed. 2d 881 (1995), *citing Powell v. McCormack*, 395 U.S. 486, 547, 89 S.Ct. 1944, 1977, 23 L.Ed. 2d. 491 (1969).

E. The newsworthiness standard is impermissibly subjective.

In looking at Professor Mack's formulation of newsworthiness in *Marcus v. Iowa Public Television*, 93 F.3d 1137, 1143-1144 (8th Cir. 1996), as well as the formulation of Dan Miller, the Iowa Public Television executive in that case who excluded seven third party candidates from debates in *Marcus*, it is clear that the evaluations are highly subjective.[10]

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[10] The district court in *Marcus* at 93 F.3d 1143 quoted Mr. Miller's definition of newsworthiness, as follows: "As it applies to this matter, newsworthiness has a number of elements, I think. Is this candidate or this campaign, is it active in the region that it's running for? If it's a statewide campaign, for example, is it active in all of Iowa's 99 counties or in a majority of them? Does it have—my phrase, not a good one—an organization of volunteers, campaign organization beyond the campaign staff? If the candidate or campaign or party has had previous exposures to elective offices, how have they done? If they have done well, what is well? Are they growing? Is there growth in their success at the polls? Have they had previous exposure to elective office? Are they seeking the office actually to be elected to it or do they say that they are seeking it to bring ideas into the marketplace? How has their fund-raising been? Is it a broad base? Do they have a lot? Do they have little? Whatever. How are they treated by other media organizations? Have their efforts generated news in other media organizations or if there are debates, have they been included in those debates by other new organizations? What are we hearing? What are we hearing either from the public or what are we hearing from the campaigns themselves? Are people calling us and saying

Marcus at 93 F. 3d 1143. Although not mentioned by the 8th Circuit in *Marcus*, in its quotation of Mr. Miller's testimony, immediately after listing 27 factors to be considered in determining "newsworthiness," Miller said that they were only "some of the things that go into making a very subjective judgment."[11] Mr. Miller's definition illustrates the problems caused by the use of highly subjective criteria. The person attempting to comply with Miller's criteria, for example, cannot know which of the 27 criteria are most important or whether they must all be complied with.

Among his many factors, Miller asks how the fund-raising has been ("Do they have a lot [of money]?"). First, how much money do you have to have to get into a debate, especially when in *Buckley v. Valeo*, 424 U.S. 1, 49, N.5, 96 S.Ct. 612, 649 (1976), the Court suggested wealth may not be "germane" in politics. The *Buckley* opinion discussed cases invalidating government-imposed wealth restrictions on the right to vote or file as a candidate for public office and said

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you know, "Such and such had a crowd of 550 last night," or are they calling us and saying, "Such and such had a crowd of five." The last part, are we hearing anything? What are we hearing from the campaigns themselves? Politics is an enterprise that relies on the ability of its participants to sell themselves, to retail themselves. What are we hearing along that line? Do we hear a lot from the candidates themselves? Are they calling us? Are they faxing us? Are we getting encouraged by their supporters who happen to be people we know or people we don't know to pay attention to their campaigns? Do we see early indications of retail efforts in that regard in the media? Are they buying newspaper ads? Are they buying radio ads? Did they in their last campaign buy newspaper or radio ads?"

[11] Appellant's Reply Brief on appeal to the 8th Circuit Court of Appeals in *Marcus v. Iowa Public Television*, February 27, 1997 at http://www.lisco.com/~crimevaccine/appelbrief.htm (Section I(e)(4)(b) of the Brief).

wealth was not "germane to the ability to participate intelligently in the electoral process." Success in fund raising or popularity is also not germane to the issue of whether a candidate should have the right to participate in debates, and the public a right to hear his views.

Placing broad discretion in the hands of government employees to regulate who gets to speak (i.e., allowing government employees to utilize unclear, subjective standards), has long been condemned by the courts because of the potential for arbitrary action and censorship. In *Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546, 553, 95, S. Ct. 1239, 1244, 43 L. Ed.2d 448, 456 (1974), this Court stated:

> Invariably, the Court has felt obliged to condemn systems in which the exercise of such authority [to restrict the use of a government forum] was not bounded by precise and clear standards. The reasoning has been, simply, that the danger of censorship and of abridgment of our precious First Amendment freedoms is too great where officials have unbridled discretion over a forum's use. Our distaste for censorship—reflecting the natural distaste of a free people—is deep-written in our law.

II. There is no compelling state interest which permits AETN to select candidates for debates based on editorial discretion and a subjective determination of who is "newsworthy."

AETN argues it has two compelling state interests: allowing its employees to exercise "editorial judgment" and "operat[ing] the network in conformity with the FCC's licensing requirements" (Petitioner's Brief, p. 37). These are

both based on the alleged need for AETN to exercise discretion in selecting candidates for debates.

First, in the context of a federal election, there cannot be a compelling state interest that permits *subjective*, editorial decisions in selecting candidates for a debate when federal regulations require *objective* criteria. Regulations promulgated pursuant to the Federal Election Campaign Act require all broadcasters, public and private, when selecting participants for debates among candidates for federal offices, to use *pre-established objective criteria*. 11 CFR § 110.13(c). The commentary in the *Federal Register* makes it clear that this is a mandatory requirement, since the purpose of 11 CFR §110.13 is to provide a specific exception so that the news media may stage debates "without being deemed to have made prohibited corporate contributions to the candidates taking part in the debates." 60 Fed. Reg. 64,261 (1995). The public policy and governmental interest in utilizing pre-established objective criteria is "to avoid the real or apparent potential for a *quid pro quo* and to ensure the integrity and fairness of the process." *Id.* at 64,262. The commentary in the *Federal Register* also states that:

> [T]hose staging debates would be well advised to reduce their *objective* criteria to writing and to make the criteria available to all candidates *before* the debate. This will enable staging organizations to show how they decided which candidates to invite to the debate.

Id. (emphasis added).

Thus, even if AETN had a compelling interest in "maintaining editorial control" over *news programming* generally in order to satisfy the FCC and the Communications Act, there is no government interest in subjectively or

discretionarily excluding legally qualified candidates from a government-sponsored *federal election debate*.

Petitioner also argues that its exclusion of Mr. Forbes is compelled by the Federal Communications Act ("FCA"). (Petitioner's Brief at pp. 37-38). However, Congress lacks the power to authorize the State of Arkansas to exclude from the debates candidates it otherwise could not exclude under the First Amendment simply by passing the FCA and having the FCC issue licensing regulations. If Congress could so manufacture compelling state interests for the states via ordinary legislation, the states' conduct would be subject not to the rule of the Constitution, but rather to the prevailing political attitudes of Congress. In addition, even under the FCA, a broadcast licensee has numerous obligations limiting its control over programming. A licensee must regulate its programming "in light of the tastes and ascertained needs and problems of the community," *Cosmopolitan Broadcasting Corp. v. FCC*, 581 F.2d 917, 921 (D.C. Cir. 1978), and safeguarding the rights of minority party candidates is an extremely important need of any community. *Greenberg v. Bolger*, 497 F.Supp. 756, 768-72 (E.D.N.Y. 1980). Moreover, "[i]n the conflict of interests. . . between broadcasters . . . and the public . . . the Communications Act makes the interest of the public paramount." *Writer's Guild of America v. American Broadcasting*, 609 F.2d 355, 362 (9th Cir. 1979). The Communications Act and its predecessors were themselves written to cause "regulators and the licensees to walk a 'tightrope' to preserve the First Amendment values. . . ." *Id.* at 363. Broadcasting licenses are to be reviewed based on what is in the public interest, not based on the "official government view dominating public broadcasting." *Red Lion Broadcasting Co v. FCC*, 395 U.S. 367, 396, 89 S.Ct. 1794, 1810 (1969). In view of this history, constitutional compliance should not threaten any supposed

state interest in complying with the Communications Act or jeopardize any broadcasting licenses.

AETN urges that Forbes' rights are sufficiently protected under the reasonable access doctrine pursuant to the FCA, which allows *all* candidates for federal office some access to public television (albeit it may only be a few minutes). But providing a public broadcasting station with a "talking head" commercial, a right that all candidates have, is no substitute for the opportunity to debate the other candidates.[12] In *Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546, 556, 95 S.Ct. 1239, 1245, 43 L.Ed. 2d 448, 456 the Supreme Court stated:

> Whether Petitioner might have used some other, privately owned, theater in the City for the production is of no consequence. . . . Even if a privately owned forum had been available, that fact alone would not justify an otherwise impermissible prior restraint. "[O]ne is not to have the exercise of his liberty of expression in an appropriate place abridged on the plea that it may be exercised in some other place" [quoting *Schneider v. State*, 308 U.S. 147 at 163].

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[12] Judge Clark pointed out in *Chandler v. Georgia Public Telecommunications Commission*, 917 F.2d 493 (11th Cir. 1990) (Clark, J. dissenting)

> there is only one way for candidates themselves to argue their positions with each other: through the medium of a debate. . . [which] serves to inform the public far more effectively than any candidates' lone appearance could by creating a synergism between the candidates' immediately conflicting positions.

III. Any compelling interest, even if one existed, must be unrelated to the suppression of speech.

Compelling state interests that can justify the exclusion of would be speakers from a public forum are illustrated in *Schneider v. State*, 308 U.S. 147, 60 S.Ct. 146, 84 L.Ed.2d 155 (1939). Such compelling state interests must be unrelated to the suppression of speech. See e.g., *Procunier v. Martinez*, 416 U.S. 396, 414 94 S.Ct. 1800, 1811, 40 L.Ed. 2d 224 (1974); *United States V. O'Brien*, 391 U.S. 367, 377, 88 S.Ct. 1673, 1679, 20 L.Ed. 2d 672 (1968). In *City Council of the City of Los Angeles v. Taxpayers for Vincent*, 466 U.S. 789, 104 S.Ct. 2118, 80 L.Ed.2d 772 (1984), the Court analyzed *Lovell v. Griffin*, 303 U.S. 444, 58 S.Ct. 666, 82 L.Ed. 949 (1938), and explained that the discretionary licensing requirement there involved was not tailored to "a substantive evil unrelated to the suppression of ideas," and that "any enforcement carries with it the risk that the enforcement is being used merely to suppress speech, since the statute is not aimed at a substantive evil within the power of the government to prohibit." 466 U.S. at 795, n. 14. Similarly, in this case there is no substantive evil to be prohibited, and the discretion sought by AETN carries with it the risk of arbitrary action and the risk that the discretion will be used to suppress speech. Here, of course, AETN's asserted interest is the right to pick and choose which candidates will be permitted to speak in its debates — in other words, the right to edit. Obviously, the power to edit includes and consists primarily of, the right to suppress expression. As stated by the Court, in speaking of *commercial* broadcasters, "for better or worse, editing is what editors are for; and editing is selection and choice of material." *Columbia Broadcasting System v. Democratic National Comm.*, 412 U.S. 94, 124-25 (1973). While the private broadcaster can freely edit, government broadcasters must be in a different

category when it comes to the selection of candidates for a political debate.

Here, the basic state interest being asserted is an interest in *not* broadcasting speech which government employees deem unworthy of being in the debate. Thus, the asserted state interest is not only ***related*** to the suppression of speech, it *is* the suppression of speech, and is unconstitutional.

IV. The means adopted by AETN to achieve its alleged compelling state interests are inappropriate and not narrowly tailored.

The *Statement of Principles of Editorial Integrity* are recitations of broad principles, not narrow standards. If they are held to be narrowly tailored, virtually any writings that can be found in the government's files would serve to provide narrowly tailored standards. In fact, the *Statement of Principles* expressly requires AETN to provide "alternative programming" and a "wide range of programming" to serve the community needs, *not* to follow exclusionary policies. Moreover, nowhere is the standard AETN says it applied—"newsworthiness"—mentioned in the *Statement of Principles* or, to the knowledge of this amicus, any other AETN document in evidence. If newsworthiness were a clear and important standard for public broadcasting decisions, especially those dealing with political debates, surely it would be contained in some written document that AETN could point to. The basic interest asserted by AETN is an interest in allowing it to have discretion to make "journalistic decisions." But discretion is discretion and is the opposite of narrow tailoring.

V. The Government Employees at AETN are Not Independent Journalists but State Actors, and Their

Exclusionary Decisions Need to be Scrutinized by the Judiciary.

AETN argues that its judgments about newsworthiness are protected by the First Amendment, and the executive director's *editorial* decisions are "a private press function," and the press is an "adversary to the state." (Petitioner's Brief, pp. 42-44). This is a novel argument.

AETN never suggests that Ms. Howarth, its executive director, is other then a full-time government employee. She is paid by the State, and unlike federal judges, who are appointed for life, and thereby gain independence from the government, public broadcasting journalists enjoy no such position and cannot blindly be trusted to function "independently" of their government employer. Moreover, the State of Arkansas owns the television network. The 8th Circuit in *Forbes* concluded that AETN was a "governmentally owned and controlled television station." *Forbes* at 93 F.3d 500.

Certainly, if the federal government started to acquire controlling interests in privately owned broadcasting stations, there would be an uproar in this country due to First Amendment concerns that the government was trying to impose its view on the public. And no assurances that the government would not allow partisan politics to influence programming would be accepted because of the subtle (and not so subtle) ways in which money buys control. AETN, owned and controlled by the government, can hardly claim to be anything other than a state actor, and a court's limited involvement in ensuring that a public broadcaster complies with the First Amendment is warranted where political speech is concerned. History tells us that the First Amendment grew out of the tyranny of England over the colonies, when the

British government practiced censorship to prevent criticism of its rule. The threat to be feared is *government censorship*, which means silencing voices. This case simply involves a request for *additional voices* to be heard in a public forum, which is the opposite of censorship, and which poses *no* threat to a democracy.

Finally, while the private press sometimes acts as a watchdog with respect to the government, at other times the symbiotic relationship of the press with politicians (the press needs the politicians for their stories, and the politicians need the press for public exposure) results in less than watchdog independence. But even if the private press is *sometimes* in an adversarial relationship with government, in weighing First Amendment issues, it can *never* be assumed that government journalists are in an adversarial relationship with their employers.

CONCLUSION

For the foregoing reasons, Amicus NLP urges the Court to affirm the decision of the Eighth Circuit in *Forbes*.

Respectfully submitted,

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APPENDIX

A-1

Appendix

Committee for the Study of the American Electorate[1]

Statistics Released November 7, 1996

This table presents the number and percentage of eligible Americans (Voting Age Population or VAP) who voted for President in each year.

Year	VAP	Percent of VAP Voting
1996	196,507,000	48.8
1992	189,044,000	55.2
1988	182,628,000	50.1
1984	174,467,000	53.1
1980	164,595,000	52.6
1976	152,308,000	53.5
1972	140,777,000	55.2
1968	120,285,000	60.9
1964	114,090,000	61.0
1960	109,672,000	62.8
1956	104,515,000	59.4
1952	99,929,000	61.6
1948	95,575,000	51.1
1944	85,654,000	56.1
1940	84,728,000	58.8
1936	80,354,000	56.8
1932	75,768,000	52.6
1928	71,185,000	51.8
1924[2]	66,414,000	43.8
1924[2]	59,503,466	48.9

[1] These statistics are compiled by the Committee for the Study of the American Electorate, 421 New Jersey Ave., S.E., Washington, D.C. 20003.

[2] The Census Bureau's estimate of 1924 Voting Age Population includes an unusually high number of unnaturalized residents who could not vote. For this reason, the second set of figures for 1924 turnout, is based on an alien-adjusted estimate of VAP, to provide a more accurate comparison.

International Foundation for Election Systems[1] Voter Turnout in Foreign Countries as a Percent of Voting Age Population (VAP)

Country	Date of Most Recent Election[2]	VAP	Percent of VAP Voting
Austria	Dec. 17, 1995	6,269,000	76.1%
Canada	Oct. 25, 1993	22,165,000	61.2%
Denmark	Sept. 24, 1994	4,101,000	81.9%
Finland	March 19, 1995	3,935,000	70.6%
France	April 23, 1995	44,299,000	70.8%
Germany	Oct. 16, 1994	65,770,000	72.6%
Ireland	Nov. 25, 1992	2,481,000	70.6%
Sweden	Sept. 18, 1994	6,811,000	82.8%
United Kingdom	April 9, 1992	44,761,000	74.4%

[1] These statistics are compiled by the International Foundation for Election Systems, a non-profit educational organization with headquarters at 1101 15th Street, N.W., Third Floor, Washington, D.C. 20005.

[2] All elections are parliamentary elections other than France, which was a presidential election, and Germany, which was a legislative election. None of these countries have compulsory voting.